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No. 203

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

WILLIAM JOSEPH BREAULT and
BONNIE JO ELLEN KATHRYN BREAULT,

Petitioners,

vs.

HAROLD L. FEIGENHOLTZ and RICHARD DAHM, individually and as Executors and Trustees under the Last Will and Testament of Kathryn M. Breault, deceased; HAROLD L. FEIGENHOLTZ, as Executor and Trustee under the Last Will and Testament of Oscar J. Breault, deceased; EUGENE A. BUSCH, as Successor-Trustee under the Last Will and Testament of Oscar J. Breault, deceased; and IRMA MEYERS, *Respondents,*

LITTLE SISTERS OF THE POOR OF CHICAGO; ST. HEDWIG INDUSTRIAL SCHOOL FOR GIRLS; POLISH MANUAL TRAINING SCHOOL FOR BOYS; ESTELLE ANGELA BREAULT; KENNETH BREAULT; and WESLEY MEMORIAL HOSPITAL, *Defendants.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

STATEMENT.

The petition for a writ of certiorari seeks to draw in question the propriety of a decision of the Court of Appeals for the Seventh Circuit affirming decretal orders

entered by the United States District Court for the Northern District of Illinois, Eastern Division, in a diversity case that involved solely questions of Illinois law, on the ground that Illinois decisions were misapplied.

Dissatisfied with the Court of Appeals judgment, petitioners filed a petition for a rehearing and for a rehearing *en banc,* which was unanimously denied.

This occurred against a background of other unrelenting and generally unsuccessful litigation on their part that commenced six years ago and shows no signs of exhaustion. *In re Estate of Breault,* 29 Ill. (2) 165, 193 N.E. (2) 824 (1963); *In re Estate of Breault,* 63 Ill. App. (2) 246, 211 N.E. (2) 424 (1965); *Breault* v. *Marovitz, Judge of the United States District Court,* mandamus, C.A. 7, No. 15155, (1965) unreported. (App. 142)

There are errors in the petition.

Count I of the amended complaint was tried on a stipulation of facts (App. 73-101). By order of the District Court, a responsive pleading to Count II was deferred until the further order of the court (App. 62). The petition for approval of the settlement agreement, filed long after the trial (App. 111-114), to which these respondents filed a number of objections (App. 115-120), was decided upon the ground that the court did not have jurisdiction to destroy a spendthrift trust (App. 121), although at the hearing, one of respondents' counsel offered to introduce evidence and argue in support of the other objections. The District Judge stated he did not think it would be necessary because he could not approve any settlement agreement that vitiated the spendthrift trust (Appellees' App. 9).

Petitioners' reference to the District Judge's remarks that but for the spendthrift trust provisions, he would have no hesitancy in approving the settlement agreement (Pet. for Cert. p. 14), should be construed in context, and should not be dignified as a ruling upon the other objections which he never reached.

Moreover, petitioners relate as facts matters not contained in the stipulation of facts. The third paragraph on p. 5 of the petition for certiorari; the last paragraph on p. 6 thereof; the first, second and third paragraphs on p. 7; the last paragraph on p. 10; the last sentence in the partial paragraph at the top of p. 21; parts of the first complete sentence on p. 29; the sentence on p. 29 that there is a genuine controversy as to the validity of Oscar's contested will, do not appear in the stipulation.

Page 2 of the petition for certiorari refers to Feigenholtz, an Illinois attorney, as "well known to the bench and bar of Illinois." There was no proof of that; and inasmuch as he is entitled to the presumption of character and fitness, the remark, standing alone, seems innocuous.

But when the words are modified by the statement that the petitioners are aware of the rule that "it is highly improper for counsel on appeal to make groundless charges against fellow members of the bar" (Pet. for Cert. p. 29), and when they are repeated in connection with bringing him to account for alleged derelictions as a trustee (Pet. for Cert. p. 29), the words in such a context, and in conjunction with petitioners' baseless criticism of the administration of justice by the federal courts in Chicago, and their belief that he was receiving "undue protection" and their "fear" of "local bias", add up to a prejudicial interference with his rights in this Court.

Throughout the extended litigation, Feigenholtz has been subjected to groundless charges by petitioners.

In Re Estate of Breault, 29 Ill. (2) 165, 180, 193 N.E. (2) 824, when they sought his removal as executor, the Court said:

> "* * * we see neither waste, wilfulness nor bad faith * * *".

Two years later, the Appellate Court of Illinois in *Re Estate of Breault,* 63 Ill. App. (2) 246, 258, 211 N.E. (2) 424, had occasion to say:

> "In the instant case there is no evidence of bad faith on the part of the executor."

ARGUMENT.

I.

The decision below was clearly correct.

1. Petitioners claim that *Wolf* v. *Uhlemann,* 325 Ill. 165, 156 N.E. 334 (1927) is controlling as to the validity of their proposed settlement, and that *Altemeier* v. *Harris,* 403 Ill. 345, 86 N.E. (2) 229 (1949) does not mean what it says.

But *Altemeier* expressly distinguished *Wolf* when the Court said (403 Ill. 345, 351):

> "It is to be observed that in every one of the cases just cited wherein the family-settlement doctrine is announced, * * * no spendthrift provisions (were) changed or set aside. * * * In the case of *Wolf* v. *Uhlemann,* 325 Ill. 165, 156 N.E. 334, while a trust for accumulation was created by the will, yet the court reached its conclusion largely by reason of the extremely doubtful meaning of the will. * * * There was no discussion of the power to terminate a spendthrift trust. * * *"

At p. 352 of *Altemeier,* the Court said:

> "Likewise, the rule is clear that a spendthrift trust may not be destroyed or terminated by the unanimous consent of the beneficiaries."

At. p. 353 of *Altemeier,* the Court said:

> "* * * the general family settlement rule has never been applied in this State where the result would be to permit the determination of a trust under the instances enumerated".

At p. 355:

> "In view of the foregoing, we are of the opinion that the object and purpose of a trust created by a will cannot be varied or terminated unless the purpose of the trust is accomplished, nor can such a trust be terminated by unanimous consent where it contains spendthrift provisions or where contingent interests cannot be definitely ascertained."

At p. 357:

> "We are fully in accord with the decision of the Appellate Court that the appellants have not brought themselves into a position where they can take advantage of the family settlement doctrine."

Reverting parenthetically to the Appellate Court decision to ascertain what it said that the Supreme Court of Illinois was in accord with, we find this (335 Ill. App. 130, 139, 81 N.E. (2) 22):

> "The fact that family settlements are favorites of the law in nowise changes the rules of law applicable to trusts. In our opinion this is not a case for the application of any of the rules of law pertaining to family settlements."

In disposing of the point that it is better for the parties to settle than to litigate for the sake of maintaining a spendthrift trust, a point which overlooks entirely the intent of the testator, the Supreme Court said in *Altemeier,* p. 357:

> "Merely because * * * the present interests of the * * * descendants would be materially benefited by the approval of the decree * * * presents no ground for unsettling the established principles of equity jurisdiction, which would undoubtedly occur were we to terminate the trust."

Altemeier was foreshadowed by earlier Illinois cases such as *Mohler* v. *Wesner*, 382 Ill. 225, 230, 47 N.E. (2) 64, 66; *Hartley* v. *Heirs of Wyatt*, 281 Ill. 321, 325, 117 N.E. 995, 997; *Stephens* v. *Collison*, 274 Ill. 389, 397, 398, 113 N.E. 691, 694; *Anderson* v. *Williams*, 262 Ill. 308, 315, 104 N.E. 659, 661; *Wood* v. *Gridley*, 217 Ill. App. 579, 586.

Illinois courts have gone farther than those of most states to uphold spendthrift trusts.

In *Stein* v. *La Salle Nat. Bk.*, 328 Ill. App. 3, 6, 65 N.E. (2) 216, decided before, and not after, *Altemeier*, as the petition for certiorari states, p. 27, the Court in an opinion by Mr. Justice Kiley said:

> "Courts of this State have been careful to protect the trust schemes of testators. * * * The United States Circuit Court of Appeals for the 7th District said in *Commissioner of Internal Revenue* v. *Blair*, 60 Fed. (2) 340, that Illinois courts have gone farther than those of most States to uphold spendthrift trusts."

Mr. Justice Kiley declined to follow *Wolf* for the reason, among others, that no family would be torn asunder by the litigation threatened there.

No family was being torn asunder in the case at bar. Years of bitter litigation while Oscar J. Breault was alive, had taken care of that. *In re Estate of Breault*, 29 Ill. (2) 165, 167, 193 N.E. (2) 824, 826.

District Judge Marovitz observed:

> "There has been no closeness in this family at all, none at all. They have been like total strangers." (Appellees' App. 10).

Following *Altemeier*, there were three pertinent Illinois Appellate Court decisions. *Tree* v. *Cont. Ill. Nat. Bk. & T. Co.*, 346 Ill. App. 509, 105 N.E. (2) 324 (1952); *Thorne* v.

Cont. Ill. Nat. Bk. & T. Co., 18 Ill. App. (2) 163, 151 N.E. (2) 398 (1958); *Guttman* v. *Schiller*, 39 Ill. App. (2) 58, 187 N.E. (2) 315 (1963).

In *Tree*, the Appellate Court, although it reversed the approval of a family settlement terminating a spendthrift trust, said that if there were a substantial basis for doubt as to the validity of the trust provisions, the family-settlement doctrine could apply. The court went on to hold there was no such doubt, and concluded with a quotation from *Altemeier* that a testamentary spendthrift trust could not be terminated by unanimous consent. Mr. Justice Kiley concurred.

The petition for approval of the settlement in the case at bar did not set forth that there was a substantial basis for doubt. (App. 111-114)

Thorne and *Guttman* were decided by different divisions of the Illinois Appellate Court, and embraced without the reservation mentioned in *Tree*, the holding of *Altemeier*. In *Thorne*, the court, although approving the invasion of the corpus, emphasized that the spendthrift clauses were not destroyed. Mr. Justice Kiley concurred in *Thorne*.

Guttman was not mentioned in the petition for certiorari, although it is the latest decision of an Illinois court of review on the subject.

Illinois courts have drawn another pertinent distinction between the termination of ordinary trusts and that of spendthrift trusts.

In the former, the trustee is regarded as a mere stakeholder, and his only interest in a settlement is that he be protected in making the distribution. *Wolf* v. *Uhlemann*, 325 Ill. 165, 184, 156 N.E. 334. In the case of spendthrift

trusts, however, the state law makes it the trustee's obligation to maintain the trust in the trial and higher courts. *Altemeier* v. *Harris,* 335 Ill. App. 130, 138, 81 N.E. (2) 22; 403 Ill. 345, 86 N.E. (2) 229; *Tree* v. *Cont. Ill. Nat. Bk. & T. Co.,* 346 Ill. App. 509, 518, 105 N.E. (2) 324; *Stein* v. *La Salle Nat. Bk.,* 328 Ill. App. 3, 5, 65 N.E. (2) 216.

It would be an exercise in futility for the law to require the trustee to defend the spendthrift trust in all courts, and at the same time require him to permit its destruction at the behest of those he was opposing.

Petitioners have not cited a single Illinois case where a court of review has approved the termination of a testamentary spendthrift trust by agreement of the parties. Petitioners' effort to place *Wolf* in the category of a spendthrift trust is expressly discredited by *Altemeier* (403 Ill. 345, 351), and the State Supreme Court in *Wolf* did not once refer to the trust there as a spendthrift trust.

Even if the reservation in *Tree,* which the Court of Appeals in the case at bar "rejected as out of harmony with the controlling Illinois Supreme Court precedent", were valid, there was no showing here of a substantial basis for doubt, other than what the beneficiaries of the settlement affirmed to each other. Circuit Judge Castle fairly appraised their position when he said:

> "* * * the only doubts as to validity * * * are raised by the beneficiaries * * * for the self-serving purpose of solving the controversy they have created".

2. Petitioners' contentions under Count I in regard to the invalidity of the trust provisions are fully answered by the irrefutable decision of the Court of Appeals, as well as the able decision of the District Court. (App. 121-142)

3. As to Count II, petitioners refuse to read what they there alleged, with their eyes open. All their wailing about "their prolonged quest to bring a local lawyer to account" is sheer histrionics. Count I alleged their personal claim to all the trust assets to the exclusion of the other heirs (App. 28). Count II alleged that "for the reasons set forth in Count I, the assets of the Kathryn Breault trust are vested in the plaintiffs (petitioners here), including any accretions and undistributed income therefrom", and that they were "in the position of minor remaindermen". (App. 32) Since the filing of the amended complaint, they attained their majority. When the District Court decided that the petitioners had no interest in Kathryn's trust estate, and could establish none even if Oscar's will were declared invalid, it had no alternative except to dismiss Count II, which is based on their allegation that the trust assets vested in them as remaindermen. There is not one word that they were seeking the accounting on behalf of Oscar's estate.

Had they intended to claim the accounting on behalf of Oscar's estate, they knew that their remedy under Illinois law was to apply to the probate division of the Circuit Court of Cook County, Illinois, for appointment of a special administrator to prosecute a suit for accounting. *In re Estate of Breault,* 29 Ill. (2) 165, 179, 180, 193 N.E. (2) 824; *Parish* v. *Parish,* 29 Ill. (2) 141, 149, 193 N.E. (2) 761, 766.

That is why it would have been pointless to have given them leave to amend, which they did not even request, and to have required respondents to go through the formality of pleading to Count II.

That is what the Appellate Court of Illinois in *In Re Estate of Breault*, 63 Ill. App. (2) 246, 261, 211 N.E. (2) 424, meant when it said that since Count II sought the complete accounting "in their behalf", it removed that claim from the possible assets of Oscar's estate, inasmuch as they were contending in the state court there that the estate was not insolvent. The State Appellate Court would not permit them the luxury of inconsistency—a not infrequent failing of theirs. (See Appellees' Brief in Court of Appeals, pp. 1-4; copies filed in this Court.)

4. Their allusion to the will contest as a basis for settlement is devoid of merit. They ask this Court to accept as established fact the controverted allegations of their complaint to set the will aside.

There was no showing of any kind that Feigenholtz participated in the execution of Oscar's will, or that he knew about it, or that he was even in the city, at the time. He was not a beneficiary thereunder. That he was executor and trustee; that the will was drafted in his office; and that he would be entitled to compensation for his services as executor and trustee, did not under Illinois law make him a beneficiary, or create any presumption of undue influence against him.

In *Pond* v. *Hollett*, 310 Ill. 31, 141 N.E. 403, it was also argued that the decedent's lawyer, who was business agent of her large estate, whose law office drafted the will, and who was her executor and trustee, and was to receive large compensation under the will, was by reason thereof a beneficiary, and subject to a presumption of undue influence.

The Court overruled that contention and said, p. 36:

> "To say that one becomes a beneficiary by being paid what is fair and reasonable for services is utterly

> groundless. A dollar's worth of service for a dollar neither renders the one who performs the service nor the one for whom it is performed the beneficiary of the other. * * * the universal rule is that the benefit must be direct and not merely consequential."

The Court added, p. 37:

> "The selection by a testator of one with whom he has had business relations and in whom he had trust and confidence is the thing to be expected in the natural working of a normal and rational mind."

The Court distinguished cases such as *Gum* v. *Reep*, 275 Ill. 503, 114 N.E. 271, cited by petitioners on p. 20 of their petition for certiorari, and said, p. 37:

> "Counsel for appellees seek to sustain their position that Hollett received a substantial benefit raising a legal presumption of undue influence, but none of the cases cited sustain that position. * * * No case has been found which tends in any degree to sustain the argument."

In the *Breault* case, 63 Ill. App. (2) 246, 260, 211 N.E. (2) 424, the Court said:

> "In the case at bar, although respondents contend that Feigenholtz is a beneficiary, we do not regard him as such * * *."

The fact that Busch, who witnessed Oscar's will, was related to Feigenholtz, does not create an inference destructive of the validity of the will. *MacKay* v. *Costigan*, 179 Fed. (2) 125, 132, C.A. 7.

5. A word remains to be said about their claim that the courts below blocked efforts to terminate the litigation by

any settlement which did not maintain Feigenholtz as trustee. (Pet. for Cert. p. 30)

The problem that confronted the District Judge was to try to effect a settlement that would advance the interests of the heirs without destroying the spendthrift trust, which he believed the state law did not permit, or omitting Feigenholtz, who was chosen by both Oscar and his mother, and who, Judge Marovitz felt, had done a commendable job in the operation of the family business. (Appellee's App. 8, 9, 11) (*Cf. Thorne* v. *Cont. Ill. Nat. Bk. & T. Co.*, 18 Ill. App. (2) 163, 175, 151 N.E. (2) 398.)

Out of respect for Judge Marovitz's wishes, the trustees offered to invade the corpus to the extent of $583,000, and offered the heirs the election of two directors of their own choosing, out of a total of five, in order to facilitate the settlement suggested by the District Judge. (Appellees' App. 9-11)

Petitioners were unmoved.

II.

The decision below related solely to Illinois law; was obviously reasonable; and was made and passed upon by federal judges of experience in the jurisprudence of that State.

The Court has said that in questions of local law, it gives special weight to the statements in that respect of federal judges from the local bar, *Bernhardt* v. *Polygraphic Co. of Am.*, 350 U.S. 198, 204, 205; that in dealing with issues of state law, it is hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable, *U.S.* v. *Durham Lumber Co.*, 363 U.S. 522, 526, 527; and that the Court or-

dinarily accepts the determination of state law as found by the Court of Appeals, where the same finding is made by the District Court. *Appalachian Power Co.* v. *American Institute of C.P.A.*, 80 S. Ct. 16, 18 (Opinion by Mr. Justice Brennan as Circuit Justice).

District Judge Marovitz had been an Illinois judge many years.

Circuit Judge Castle had been an Illinois judge with extensive experience in probate matters, and an Attorney General of Illinois.

Circuit Judge Schnackenberg was a lawyer of long experience in the jurisprudence of Illinois, and had been Speaker of the Illinois House of Representatives, and thereafter an Illinois judge a long time.

Circuit Judges Kiley and Knoch, who sat *en banc,* had been Illinois judges. Judge Kiley sat on the Illinois Appellate Court bench many years, and as mentioned *supra,* wrote or participated in three of the Illinois opinions cited by the panel.

Therefore, when Judge Kiley joined in the denial of the petition for rehearing *en banc,* his action may be considered as a confirmation by an expert on the subject, that the panel had not decided the case in a way in conflict with applicable Illinois law.

The Court of Appeals reached a plainly reasonable and permissible result, and the petition for certiorari does not disclose the exceptionally clear showing of error that is required in matters of local law to change the result. Even

if reasonable arguments could be made on both sides, it would still be insufficient to disturb the decision of the Court of Appeals on such matters.

In *Estate of Spiegel* v. *Comm'r.*, 335 U.S. 701, 708, the Court was faced with a decision of the Court of Appeals on a difficult state law problem, which in the words of Mr. Justice Black, speaking for the majority, was "not an easy one". Refusing to reverse, Mr. Justice Black said:

> "It is sufficient for us to say that we think reasonable arguments can be made based on Illinois cases to support a determination of this question either for or against the petitioner's contention. Under these circumstances we will follow our general policy and leave undisturbed this Court of Appeals holding on a question of state law."

Petitioners' claims that the Court of Appeals decision conflicts with applicable state law, and has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure, as to call for this Court's supervision, are as untenable as their aspersions upon the federal courts below.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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